

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

EL PASO COUNTY, TEXAS
500 E. San Antonio
El Paso, TX 79901 and

BORDER NETWORK FOR HUMAN RIGHTS
2115 N. Piedras St
El Paso, TX 79930,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States of America
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500,

MARK T. ESPER, in his official capacity as Acting
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301,

KEVIN McALEENAN, in his official capacity as
Acting Secretary of Homeland Security
245 Murray Lane, SW, Mail Stop 0485
Washington, DC 20528-0485,

TODD T. SEMONITE, in his official capacity as
Commanding General
United States Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000,

DAVID BERNHARDT, in his official capacity as
Acting Secretary of the Interior
1849 C Street, NW
Washington, DC 20240,

Defendants.

Civil Action No. 3:19-cv-66-DB

**SUPPLEMENTAL BRIEF IN
LIGHT OF NOTICE OF
DECISION BY THE
DEPARTMENT OF DEFENSE
TO AUTHORIZE BORDER
BARRIER PROJECTS
PURSUANT TO 10 U.S.C.
§ 2808**

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT.....	2
I. DOD’S RECENT ACTIONS CONFIRM PLAINTIFFS’ ARTICLE III STANDING TO CHALLENGE THE PROCLAMATION AND DOD’S § 2808 SPENDING.....	2
A. El Paso County Has Standing	2
B. BNHR Has Standing	5
II. DEFENDANTS’ RECENT ACTIONS CONFIRM THAT PLAINTIFFS HAVE AN APA CAUSE OF ACTION	6
A. DOD’s Recent Announcements Confirm That It Has Taken “Final Agency Action” Under § 2808	8
B. If the Zone of Interests Test Applies, Plaintiffs Satisfy It	8
III. PLAINTIFFS RESPECTFULLY REQUEST THAT THE COURT RESOLVE THEIR CLAIMS AS EXPEDITIOUSLY AS POSSIBLE.....	10
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Armstrong v. Exceptional Child Ctr.</i> , 135 S. Ct. 1378 (2015).....	7
<i>Ass’n of Cmty. Orgs. For Reform Now v. Fowler</i> , 178 F.3d 350 (5th Cir. 1999)	6
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	5, 9
<i>Chamber of Commerce v. Reich</i> , 74 F.3d 1322 (D.C. Cir. 1996).....	7
<i>Czyzewski v. Jevic Holding Corp.</i> , 137 S. Ct. 973 (2017).....	3
<i>Duarte ex rel. Duarte v. City of Lewisville</i> , 759 F.3d 514 (5th Cir. 2014)	2
<i>Ecosystem Investment Partners v. Crosby Dredging, L.L.C.</i> , 729 F. App’x 287 (5th Cir. 2018)	3
<i>K.P. LeBlanc</i> , 627 F.3d 115 (5th Cir. 2010)	2, 4
<i>Lexmark Int’l Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014).....	8
<i>Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak</i> , 567 U.S. 209 (2012).....	8, 10
<i>Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.</i> , 547 U.S. 47 (2006).....	5
<i>Sierra Club v. Trump</i> , 929 F.3d 670 (9th Cir. 2019)	10
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014).....	2, 5
<i>Texas Democratic Party v. Benkiser</i> , 459 F.3d 582 (5th Cir. 2006)	2, 4
<i>Texas v. United States</i> , 809 F.3d 134 (5th Cir. 2015)	5

TABLE OF AUTHORITIES

(Continued)

	Page(s)
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018).....	9
<i>U.S. Army Corps of Eng'rs v. Hawkes Co.</i> , 136 S. Ct. 1807 (2016).....	8
<i>United States v. MacCallom</i> , 426 U.S. 317 (1976).....	7
 Statutes	
10 U.S.C. § 2808.....	3, 4
10 U.S.C. § 2808(a)	5, 9
10 U.S.C. § 284(a)	10
5 U.S.C. § 702.....	7
5 U.S.C. § 706(2)	7
5 U.S.C. § 706(2)(B).....	9
 Other Authorities	
Nick Miroff & Josh Dawsey, <i>'Take the land': President Trump wants a border wall. He wants it black. And he wants it by Election Day.</i> , Washington Post (Aug. 27. 2019), available at https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70_story.html	11
U.S. Const. art. I, § 9, cl. 7.....	9

INTRODUCTION

On September 3, 2019, Defendants gave the Court notice that the Department of Defense (DOD) has made a final determination to build eleven border wall projects using \$3.6 billion in military construction funds under 10 U.S.C. § 2808. And on September 5, 2019, Defendants gave notice identifying the military construction projects that Congress had already appropriated money for that will now lose funding in order to build those eleven wall projects. Most relevant here, DOD will divert \$20 million away from a planned military construction project at Fort Bliss in El Paso County, and one of the new wall projects will take place in southern New Mexico, in El Paso County's close vicinity.

DOD's recent actions erase any possible doubt about Plaintiffs' Article III standing and right to sue under the Administrative Procedure Act (APA). First, the diversion of funds away from Fort Bliss, the lifeblood of El Paso's economy, confirms the County's direct economic injury. Similarly, planned § 2808 wall projects in southern New Mexico will force the Border Network for Human Rights (BNHR) to devote further resources toward counteracting Defendants' unlawful actions. Second, DOD's determination substantiates the existence of "final agency action" under the APA, and the diversion of funds away from Fort Bliss ensures that the County falls squarely within the Appropriation Clause's and § 2808's "zone of interests," to the extent that test applies. In sum, DOD's recent repurposing of funds that Congress intended for other ends definitively confirms both Plaintiffs' ability to assert their respective claims.

In all events, DOD's actions reaffirm the urgency of this case, and the speed with which Defendants seek to construct a wall. After these actions, there are no plausible obstacles to reaching the merits of Plaintiffs' claims and resolving them in Plaintiffs' favor.

ARGUMENT

I. DOD’S RECENT ACTIONS CONFIRM PLAINTIFFS’ ARTICLE III STANDING TO CHALLENGE THE PROCLAMATION AND DOD’S § 2808 SPENDING

To establish Article III standing, a plaintiff must demonstrate an injury in fact that is fairly traceable to the defendant’s challenged action, and a likelihood that the injury will be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). As explained in Plaintiffs’ opening and reply briefs, Plaintiffs have standing to challenge the Proclamation, as well as Defendants’ expenditure of funds on a border wall pursuant to 10 U.S.C. §§ 2808 and 284. *See* Pls. Opening Br. 9-19; Pls. Reply Br. 2-15. On September 3 and 5, 2019, Defendants announced the specific border wall projects they will use § 2808 funds to build, *see* ECF No. 112, and the already-planned military construction projects that will now be sacrificed in favor of the border wall, *see* ECF No. 114; ECF No. 114-1. Defendants’ recent actions confirm Plaintiffs’ standing to challenge the President’s Proclamation and DOD’s use of § 2808 to build a border wall.

A. El Paso County Has Standing

“[I]f a plaintiff is an object of a government regulation, then that plaintiff ordinarily has standing to challenge that regulation.” *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014). And when a plaintiff suffers “a direct pecuniary injury” that, too, is generally “sufficient to establish injury-in-fact.” *K.P. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010); *see Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (“economic injury is a quintessential injury upon which to base standing”). That is equally true where the economic injury stems from the “loss of a non-illusory opportunity” to obtain “a benefit.” *Ecosystem Investment Partners v. Crosby Dredging, L.L.C.*, 729 F. App’x 287, 292 (5th Cir. 2018); *see Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (standing where

challenged action deprived party of “a chance to obtain a settlement that respected [its] priority” in bankruptcy).

Congress has appropriated funds for DOD to spend on military construction projects. *See* Pls. Opening Br. 35. Before the President’s Proclamation, DOD had planned to use at least \$20 million of those funds to build “Defense Access Roads” at Fort Bliss, a military base in El Paso County. *See* ECF No. 114-1; ECF No. 55-21. According to a top County official’s sworn declaration, Fort Bliss is the “lifeblood of the El Paso economy.” ECF No. 55-26, ¶ 15; *id.* ¶ 14 (Fort Bliss “drives our economy”). Indeed, a study by the University of Texas-El Paso’s Institute for Policy and Economic Development shows that Fort Bliss has a “\$5.9 billion economic impact on El Paso County,” and “create[s] nearly 62,000 jobs with more than \$4 billion in compensation to area households.” *Id.* ¶ 15. “[T]he financial health of Fort Bliss,” therefore, “affects the real estate market and every other aspect of the economy in El Paso.” *Id.* So the planned \$20 million construction project would have benefited Fort Bliss, and in turn benefited the County’s economy.

Section 2808 states that “[i]n the event of . . . the declaration by the President of a national emergency in accordance with the National Emergencies Act [NEA] that requires use of the armed forces, the Secretary of Defense . . . may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces.” 10 U.S.C. § 2808. “Such projects,” it continues, “may be undertaken only within the total amount of funds that have been appropriated for military construction.” *Id.* When President Trump invoked the NEA to declare “the current situation at the southern border” a “national emergency,” he simultaneously “invoked and made available” funds under § 2808, so that DOD could spend \$3.6 billion in military construction funds on a border wall. ECF No. 55-14; *see*

ECF No. 95-5. Because that \$3.6 billion had to come from “the total amount of funds that have been appropriated for military construction,” 10 U.S.C. § 2808, certain already-planned construction projects would have to be foregone to build the wall. Accordingly, on March 18, 2019, DOD sent Congress a “Fact Sheet” identifying already-planned military construction projects from which funding could be diverted for the wall, including projects at Fort Bliss. ECF No. 55-21. In Plaintiffs’ opening and reply briefs, they showed that the threatened loss of funding from Fort Bliss established Article III injury. *See* Pls. Opening Br. 14; Pls. Reply Br. 6.

On September 5, 2019, Defendants gave notice that DOD had made the final determination to divert \$20 million away from planned construction on “Defense Access Roads” at Fort Bliss, to be used on building a wall under § 2808. *See* ECF No. 114; ECF No. 114-1. That diversion of funds substantiates the County’s “direct pecuniary injury” that suffices for Article III standing. *LeBlanc*, 627 F.3d at 122. After all, it strips funds from the “lifeblood of the El Paso economy,” and it eliminates the many jobs that new construction at Fort Bliss would have created. *See* ECF No. 55-26, ¶¶ 14-16. Such “economic injur[ies] [are] quintessential injur[ies] upon which to base standing.” *Texas Democratic Party*, 459 F.3d at 586.

These injuries confer standing to assert both the claim that Defendants’ expenditure of § 2808 funds violates the Appropriations Clause and APA, *see* Pls. Opening Br. 33-40, 45, and the claim that the President’s Proclamation violates the NEA, *id.* at 19-30. The § 2808 border wall expenditure itself directly causes the County’s injuries, because were it not for that expenditure, then DOD would not need to divert funds from Fort Bliss. Enjoining that § 2808 expenditure as a violation of the Appropriations Clause and/or APA would accordingly redress the County’s injuries. The President’s Proclamation likewise causes the County’s injuries, and in the same way: without the Proclamation, DOD could not have invoked § 2808 at all, because

§ 2808 authority is only triggered upon a valid NEA emergency declaration. *See* 10 U.S.C. § 2808(a). So if this Court were to declare the Proclamation unlawful, as Plaintiffs request, that ruling would halt DOD’s use of § 2808 altogether, preventing the diversion of Fort Bliss funds and relieving the County’s injuries. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (standing depends on whether plaintiffs’ injuries are “fairly traceable” to the defendant’s challenged actions, not on whether “the defendant’s actions are the very last step in the chain of causation”).

Defendants have euphemistically labelled the diversion of funds a mere “deferr[al] [of] military construction projects.” ECF No. 114. But the action is a “deferral” only in the empty sense that, in a future fiscal year, Congress could hypothetically appropriate money to replenish funding for the sacrificed projects. Such “theoriz[ing]” about future congressional action “does not negate” the County’s present economic injury. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). Nor does it matter that the \$20 million formerly intended for Fort Bliss has not, as of yet, been “made available to the Secretary of the Army.” ECF No. 114 (noting that such funds “will be made available to the Secretary of the Army when it is needed for obligation”). DOD’s final determination to spend \$3.6 billion on a border wall under § 2808 confirms that the diversion of funds from Fort Bliss is “certainly impending”—which is all that Article III requires. *Driehaus*, 573 U.S. at 158.

B. BNHR Has Standing

Because the County clearly has standing to challenge the Proclamation and Defendants’ use of § 2808 (whether under the Appropriations Clause or the APA), this Court need not address whether BNHR also has standing to assert those claims. *See, e.g., Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) (“the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement”). But DOD’s recent actions confirm BNHR’s standing, too.

“[A]n organization has standing to sue on its own behalf where it devotes resources to counteract a defendant’s allegedly unlawful practices.” *Ass’n of Cmty. Orgs. For Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999). BNHR has standing to challenge Defendants’ actions, because they have forced BNHR to steer resources away from “its core mission” of human rights education and “promoting immigration reform,” and toward “counsel[ing] community members who are fearful,” “organizing [its] community in opposition to the President’s declaration,” and “opposing the illegal [border wall] construction.” ECF No. 55-27, ¶¶ 13, 27; Pls. Opening Br. 16-19; Pls. Reply Br. 7-11. DOD’s recent actions cement BNHR’s standing. DOD has made a final determination to spend § 2808 funds on building a border wall in El Paso Sector 2. ECF No. 112, at 4; ECF No. 112-1, at 3. That project will involve replacing 23.51 miles of vehicle barriers with new pedestrian fencing in Hidalgo and Luna Counties, New Mexico. *Id.* BNHR members live in southern New Mexico, ECF No. 55-27, ¶ 4, so the construction there will directly affect the organization, causing it to devote more resources to “opposing the illegal [border wall] construction,” *id.* ¶ 33. That, in turn, solidifies BNHR’s standing to challenge both Defendants’ expenditure of § 2808 funds, and the President’s Proclamation that directly enabled such expenditures. (BNHR has standing to challenge Defendants’ \$2.5 billion wall expenditure under 10 U.S.C. § 284 for the same basic reasons. *See* Pls. Opening Br. 16-19; Pls. Reply Br. 7-11.)

II. DEFENDANTS’ RECENT ACTIONS CONFIRM THAT PLAINTIFFS HAVE AN APA CAUSE OF ACTION

Defendants lack authority to spend any funds on a border wall beyond the \$1.3 billion that Congress appropriated for fencing in the Rio Grande Valley in the Consolidated Appropriations Act (CAA). Pls. Opening Br. 30-44; Pls. Reply Br. 36-52; CAA § 739 (prohibiting any “increase” in “funding for a . . . project . . . proposed in the President’s budget

request” beyond the amount appropriated in the CAA). Such expenditures violate both the Appropriations Clause, because they have not been affirmatively “authorized by Congress,” *United States v. MacCollom*, 426 U.S. 317, 321 (1976), and the APA, because they are “contrary to constitutional . . . power” and “in excess of statutory . . . authority,” 5 U.S.C. § 706(2). Plaintiffs have two separate and independent causes of action to assert these claims: (1) the equitable right to “sue to enjoin unconstitutional actions by . . . federal officers,” *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015)—here, actions that violate the Appropriations Clause; and (2) the APA itself, which confers a right to sue on those “adversely affected or aggrieved by agency action,” 5 U.S.C. § 702.

In response, Defendants have pressed two main arguments. First, they have maintained that Plaintiffs lack an equitable right of action, because their Appropriations Clause claims are in fact statutory claims that they can assert *only* under the APA. Govt. Opening Br. 58-60; Govt. Reply Br. 17-19. That argument is incorrect for the reasons given in Plaintiffs’ reply brief. Pls. Reply Br. 53-55; *see Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (APA “does not repeal the review of *ultra vires* actions recognized long before”). Second, Defendants have argued that Plaintiffs lack an APA cause of action, because there is no “final agency action” as to § 2808, Govt. Opening Br. 44-45; Govt. Reply Br. 19, and because Plaintiffs fall outside the “zone of interests” of §§ 2808, 8005, 284, and the Appropriations Clause, Govt. Opening Br. 47-49; Govt. Reply Br. 20-21. That argument likewise fails for reasons already briefed. Pls. Reply Br. 56-59. And that failure is all the more evident now, in light of DOD’s recent actions.

A. DOD’s Recent Announcements Confirm That It Has Taken “Final Agency Action” Under § 2808

Defendants have not argued that DOD’s reprogramming of \$2.5 billion from one account to another pursuant to DOD Appropriations Act § 8005, or its expenditure of \$2.5 billion on the wall pursuant to § 284, are nonfinal, thereby conceding that they constitute final agency actions under the APA. But Defendants have contended that “there is no ‘final agency action’ respecting § 2808,” because DOD “has not yet decided to authorize any projects under § 2808,” and “has not made any decision to divert funds from Fort Bliss or anywhere else.” Govt. Opening Br. 44-45; Govt. Reply Br. 19. That contention lacks merit, *see* Pls. Reply Br. 56-57; but to the extent it had any, it no longer does, since DOD has now made final determinations about what border wall projects to build with § 2808 funds, and what already-planned military construction projects to sacrifice in favor of a border wall. *See supra* at 3, 6. Thus, Defendants’ “final agency action” argument is untenable: DOD has “consummat[ed]” its “decisionmaking process” concerning § 2808, and has reached a decision “from which legal consequences will flow,” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)—most pertinent here, Fort Bliss’s loss of \$20 million.

B. If the Zone of Interests Test Applies, Plaintiffs Satisfy It

The zone of interests test applies only where a plaintiff asserts that the defendant has violated a statute. *See Lexmark Int’l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (test applies to “legislatively conferred cause[s] of action” and requires “using traditional tools of statutory interpretation”). In such cases, courts ask whether the plaintiff’s interests are “arguably within the zone of interests . . . protected or regulated by the statute that he says was violated.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). By contrast, the zone of interests test has no application where a plaintiff claims that

the Government has violated the Constitution. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2415-2423 (2018) (declining to apply zone of interests test to Establishment Clause claim). Here, Plaintiffs principally contend that Defendants’ expenditure of funds on a wall without congressional authorization violates the Appropriations Clause and is therefore “contrary to constitutional . . . power” under the APA. 5 U.S.C. § 706(2)(B). Because this claim turns on a constitutional, not statutory, violation, the zone of interests test does not apply. To be sure, Defendants have raised §§ 2808, 8005, and 284 as *defenses* to Plaintiffs’ constitutional claim. But Defendants have identified no case where a court has applied the zone of interests test to a statute raised by the Government in defense. That is because the zone of interests test applies “by reference to the particular provision of law upon which *the plaintiff* relies.” *Bennett*, 520 U.S. at 175-76 (emphasis added).

Even if the zone of interests test did apply to constitutional provisions, Plaintiffs fall within the Appropriations Clause’s zone of interests. At minimum, the Appropriations Clause protects the intended beneficiary of congressionally appropriated funds that the Executive Branch then “draw[s] from the Treasury” without an “Appropriation[] made by Law.” U.S. Const. art. I, § 9, cl. 7. In this case, the County (by way of Fort Bliss) was the intended beneficiary of \$20 million in military construction funds that Defendants have now diverted toward a border wall. The County therefore satisfies the zone of interests test.

And even if the zone of interests test applied to §§ 2808, 8005, and 284—the Government’s statutory *defenses*—Plaintiffs satisfy it for those provisions as well. Those provisions govern reprogramming and expenditure of “military construction” and “counterdrug” support funds. 10 U.S.C. § 2808(a) (allowing DOD to “undertake military construction projects” with “funds that have been appropriated for military construction”); DOD Appropriations Act,

§ 8005 (allowing reprogramming “for military functions (except military construction)” under certain circumstances); 10 U.S.C. § 284(a) (DOD “may provide support for the counterdrug activities . . . of any other department or agency”). The County’s injuries stem in part from Defendants’ actions branding it a military construction zone and drug-trafficking corridor, thereby diminishing the County’s reputation and economic prospects. *See* Pls. Opening Br. 11-14; Pls. Reply Br. 2-7. Such injuries are “arguably within the zone of interests” of the “military construction” and “counterdrug” support statutes at issue. *Patchak*, 567 U.S. at 224.

In any event, DOD’s recent actions confirm that the County at the very least falls within § 2808’s zone of interests. As noted, the County was the intended beneficiary of military construction funds that DOD has now diverted away from it. A party harmed by the loss of military construction funds obviously falls within the zone of interests of the military construction statute invoked to strip those funds. Even the dissenting judge in *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), admitted that a plaintiff “who would have been entitled to the funds as originally appropriated” would fall within the zone of interests of a statute like § 2808. *Id.* at 715 (Smith, N.R., dissenting). Indeed, if such a plaintiff could not satisfy the zone of interests test, then it is impossible to imagine what type of plaintiff would. As a result, DOD’s use of § 2808 funds would be entirely unreviewable, even though courts “apply the [zone of interests] test in keeping with Congress’s evident intent when enacting the APA to make agency action presumptively *reviewable*.” *Patchak*, 567 U.S. at 225 (emphasis added).

III. PLAINTIFFS RESPECTFULLY REQUEST THAT THE COURT RESOLVE THEIR CLAIMS AS EXPEDITIOUSLY AS POSSIBLE

In all events, DOD’s recent actions reaffirm the urgent nature of this case. According to Defendants, DOD will begin obligating § 2808 construction funds within thirty days, and could begin border wall construction using those funds by October 23, 2019. ECF No. 112, at 3, 5-6.

The *Washington Post* has reported that President Trump is seeking to “fast-track billions of dollars’ worth of construction contracts, aggressively seize private land and disregard environmental rules” to “complete hundreds of miles of border fence ahead of the 2020 presidential election.”¹ Given the speed with which Defendants are acting, and the ongoing harms Defendants are inflicting on Plaintiffs, Plaintiffs respectfully ask this Court to resolve their claims as expeditiously as possible.

After this supplemental brief (and a corresponding response, if Defendants choose to file one), no further briefing is necessary. Now that DOD has officially diverted funds from Fort Bliss and announced the § 2808 projects it will build, any possible lingering questions about standing and finality have dissipated. Nor is there a need to rehash arguments about whether Defendants’ § 2808 expenditures are lawful on the merits, as the parties have fully briefed that issue. *See* Pls. Opening Br. 30-40; Govt. Opening Br. 50-51, 53-55; Pls. Reply Br. 36-44; Govt. Reply Br. 27-30. And, as ever, there is a straightforward path to resolving the case on the merits: (1) issue a declaratory judgment that the President’s Proclamation violates the NEA, and enjoin DOD from spending § 2808 funds in reliance on the Proclamation; and/or (2) hold that Defendants’ expenditure of funds on a wall beyond the \$1.3 billion appropriated in the CAA—under both §§ 2808 and 284—violates the Appropriations Clause and/or APA, and enjoin Defendants from making such expenditures.

¹ Nick Miroff & Josh Dawsey, *‘Take the land’: President Trump wants a border wall. He wants it black. And he wants it by Election Day.*, *Washington Post* (Aug. 27. 2019), available at https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70_story.html.

CONCLUSION

For the foregoing reasons, and those given in Plaintiffs' earlier briefing, Plaintiffs' summary-judgment motion and a permanent injunction should be granted. In the alternative, Plaintiffs' preliminary-injunction motion should be granted.

Dated: September 9, 2019

Respectfully submitted,

/s/ Anton Metlitsky

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CERTIFICATE OF SERVICE

I hereby certify that on this same date, I electronically filed the foregoing document with the U.S. District Court for the Western District of Texas by using the CM/ECF system, which will send notifications of such filing to all CM/ECF counsel of record.

Dated: September 9, 2019

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